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7

8 UNITED STATES DISTRICT COURT

9 NORTHERN DISTRICT OF CALIFORNIA

11 VILMA SERRALTA,

No. C0801427 CW

12 Plaintiff,

**NOTICE OF MOTION AND MOTION TO
WITHDRAW BY HOGE, FENTON, JONES,
AND APPEL, INC. AS COUNSEL OF
RECORD FOR DEFENDANTS ROOMY
KHAN AND SAKHAWAT KHAN**

13 vs.

14 SAKHAWAT KHAN; ROOMY KHAN;
and DOES ONE through TEN,
15 inclusive,

[CIV. L.R. Rule 7-2 & CIV. L.R. 11-5.]

16 Defendants.

Date: August 27, 2009
Time: 2 p.m.
Dept.: 2
Judge: Claudia Wilken
Trial Date: October 5, 2009
Complaint Filed: March 13, 2008

19
20 **TO: DEFENDANTS ROOMY AND SAKHAWAT KHAN and all Attorneys of Record:**

21 **YOU ARE HEREBY NOTIFIED** that the attorneys of record for defendants, Hoge,
22 Fenton, Jones, and Appel, Inc. (Hoge Fenton, Inc.), intend to, and hereby do, apply to the
23 Court for an order relieving it as attorneys of record for defendants Roomy Khan and
24 Sakhawat Khan. This application will be presented to the Court on August 27, 2009 at 2
25 p.m. in the courtroom of the Honorable Judge Claudia Wilken, United States District Court
26 of California Northern District, 1301 Clay Street, Oakland, California 94612, Courtroom 2,
27 Fourth Floor.

28 ///

1 **DEFENDANTS ARE SPECIFICALLY NOTIFIED¹** that if this motion to withdraw is
 2 GRANTED, no attorney at Hoge Fenton, Inc. will be representing you in this matter.
 3 Although you have retained counsel to represent you in this matter, Damien Pamilla of
 4 Paul, Benson, Myong, and Pamilla, LLP, at this time Mr. Pamilla is not currently admitted to
 5 practice law in the United States District Court of California, Northern District. However,
 6 Mr. Pamilla's application to do so is presently pending. Therefore, if the Court grants this
 7 motion, you may need to represent yourself *in pro se* (i.e., without counsel) until Mr.
 8 Pamilla's application to practice in the District Court is granted or you retain another
 9 attorney admitted to practice in this District.

10 Hoge Fenton, Inc. brings this motion to withdraw as counsel of record for
 11 defendants to obtain an order from the Court that allows Hoge Fenton to withdraw as
 12 counsel of record for defendants and for defendants to represent themselves *in pro se*,
 13 until (1) their retained counsel Damien Pamilla is admitted to practice in the United States
 14 District Court of California, Northern District; or (2) defendants retain new counsel that is
 15 admitted to practice in this district.

16 The grounds for Hoge Fenton, Inc.'s motion to withdraw are supported by the
 17 California Supreme Court authority and the California Rules for Professional Conduct, Rule
 18 3-700 (C). More specifically, Hoge Fenton, Inc.'s grounds for this motion are:

19 1. Defendants recently terminated the attorney-client relationship with Hoge
 20 Fenton, Inc.;

21 2. The attorney client relationship between Hoge Fenton, Inc. and defendants
 22 has deteriorated such that Hoge Fenton, Inc. can no longer represent either defendant,
 23 and a personal conflict has arisen making it unreasonably difficult for Hoge Fenton, Inc.
 24 continue with representation; and,

25 3. Defendants breached their Attorney-Client Fee Agreement with Hoge Fenton,

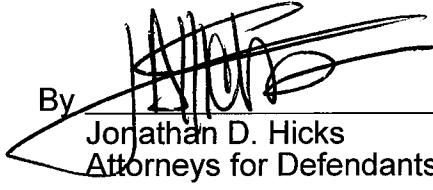
26
 27 ¹ Although not required, Hoge Fenton, Inc. includes this "Notice to Client" to clearly explain
 28 what may occur if the Court grants its motion to withdraw.

1 Inc. by not paying and refusing to pay certain attorneys' fees and expenses.

2 This motion will be based on this notice of motion; memorandum of points and
3 authorities; the declarations of Roomy Khan, Sakhawat Khan and attorney Jonathan D.
4 Hicks; and any documents potentially filed under seal pursuant to Local Rule 79-5 and/or
5 testimony offered during an in camera hearing, if so ordered by the Court. This motion is
6 also based on the file herein and any such oral or documentary evidence as may be
7 presented at the hearing of this motion.

8 DATED: July 20, 2009

9 HOGE, FENTON, JONES & APPEL, INC.

10 By 

11 Jonathan D. Hicks
12 Attorneys for Defendants

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14 MEMORANDUM OF POINTS AND AUTHORITIES

15 **I. INTRODUCTION**

16 Hoge Fenton, Inc. brings this Motion to Withdraw because (1) defendants exercised
17 their absolute right to terminate the attorney-client relationship with Hoge Fenton, Inc.; (2)
18 good cause exists under California Rule of Professional Conduct, Rule 3-700 for the
19 permissive withdrawal of Hoge Fenton, Inc. because the attorney client relationship
20 between Hoge Fenton, Inc. and defendants has deteriorated to a point such that Hoge
21 Fenton, Inc. can no longer represent defendants; and (3) to date, defendants have
22 breached their attorney-client fee agreement with Hoge Fenton, Inc. by not paying and
23 refusing to pay certain attorney's fees and expenses. Hoge Fenton, Inc.'s motion is
24 strongly supported by the overwhelming weight of California authority, the California Rules
25 of Professional Conduct, Rule 3-700 (C), and declarations from both defendants.

26 **II. BACKGROUND**

27 On April 29, 2009, Hoge Fenton, Inc. filed "Defendants' Motion for Order for
28 Withdrawal and [Proposed] Order for Withdrawal." Docket No. 101. This motion requested

1 the Court grant administrative relief to allow Hoge Fenton, Inc. to withdraw as counsel and
 2 suggests defendants Roomy Khan and Sakhawat Khan represent themselves *in pro se*.
 3 Docket No. 101, p. 2:8-15. This motion for administrative relief did not attach a stipulation
 4 or declaration from defendants.

5 On May 4, 2009, plaintiff Vilma Serralta filed an “opposition to Defendants’ Motion
 6 for Order for Withdrawal.” Docket No. 104. Plaintiff’s opposition requested the Court deny
 7 the motion to withdraw until (1) defendants have satisfied all outstanding discovery
 8 obligations, and (2) defendants retain new counsel or substitute themselves *in pro se*.
 9 Docket No. 104, p. 1:26-2:2.

10 On May 29, 2009, United States District Judge Claudia Wilken denied Hoge Fenton,
 11 Inc.’s motion to withdraw, without prejudice. Docket No. 118. Judge Wilken further
 12 ordered that “[w]ithdrawal will be allowed only if all discovery is resolved and Defendants
 13 concurrently substitute themselves *in pro per* or appear through new counsel, or if all
 14 discovery is resolved and counsel makes an adequate showing that withdrawal is
 15 appropriate under Rule 3-700(c).” Docket No. 118, p. 2:11-15.

16 At the time of Judge Wilken’s May 29th order, the pending discovery disputes were
 17 defined by United States Magistrate Judge Maria Elena James’ May 27, 2009 orders. See
 18 Docket No. 117 (regarding plaintiff’s interrogatories), Docket No. 116 (regarding plaintiff’s
 19 request for production of documents), and Docket No. 115 (regarding an order to show
 20 cause for a subpoena to Paychex, Inc.). Only two of the May 29th orders involved a
 21 discovery dispute between plaintiff and defendants: (1) the order regarding plaintiff’s
 22 interrogatories and (2) the order regarding plaintiff’s request for production of documents.
 23 Docket Nos. 117 and 116, respectively.

24 Regarding plaintiff’s interrogatories, Magistrate Judge James ordered “Plaintiff to
 25 provide Defendants with a list of guests at their residence on a regular weekly/biweekly
 26 basis. Defendants shall then, within 14 days from the receipt of Plaintiff’s list, provide the
 27 relevant contact information for those guests.” Docket No. 117, p.1:17-21.

28 Regarding plaintiff’s demand for production of documents, Magistrate Judge James

1 ordered "Defendants to either (a) respond to plaintiff's request for production with original
 2 documents or the metadata or (b) serve on Plaintiff a declaration with a written response
 3 that satisfies General Instruction #5. (Dkt. # 110, Ex.A, ¶ 5.) Defendants shall respond by
 4 June 10, 2009." Docket No. 116, p. 1:16-19.

5 In an attempt to resolve the pending discovery issues as defined by Magistrate
 6 Judge James' May 29th, defendants produced the requested supplemental discovery
 7 responses, declarations, and documents.

- 8 • On May 28, 2009 at 10:41 AM, plaintiff emailed defendants a letter with the names
 9 of three guests: "1) Bina or Veena 2) Sangita, last name unknown (and her
 10 then fiancé, now husband). . . . 3) Sal, last name unknown, and his wife."

11 Declaration of Jonathan D. Hicks In Support of Motion to Withdraw by Hoge,
 12 Fenton, Jones, and Appel, Inc., Attorneys of Record for Defendants Roomy Khan
 13 and Sakhawat Khan (Hicks' Dec.), ¶ 2, Exhibit A.

- 14 • On June 10, 2009 at 5:25 PM, defendants emailed plaintiff supplemental responses
 15 to plaintiff's interrogatories for Roomy and Sakhawat Khan that provide defendants
 16 most recent contact information for the three guests identified in plaintiff's May 28th
 17 letter. Hicks' Dec., ¶ 3, Exhibit B.
- 18 • On June 10, 2009 at 9:54 AM, defendants emailed plaintiff a declaration from
 19 Roomy Khan regarding original documents and metadata for documents bates
 20 stamped KHAN 123, 125 and 309-314. Hicks' Dec., ¶ 4, Exhibit C.
- 21 • On June 16, 2009 at 10:09 AM, plaintiff emailed defendants a letter that requested
 22 (1) more information about certain the guests because plaintiff was unable to
 23 contact them; (2) closest to the original documents for documents that correspond
 24 with KHAN 123, 125 and 309-314; and (3) metadata for documents that correspond
 25 with KHAN 308 and 125. Hicks' Dec., ¶ 5, Exhibit D. Plaintiff also demanded a
 26 declaration that comports with General Instruction # 5 for any requested document
 27 that cannot be produced. *Id.*
- 28 • On July 7, 2009 11:38 a.m., before the parties' Case Management Conference with

1 Judge Wilken, defendants faxed plaintiff (1) a declaration from Roomy Khan that
 2 details the destruction of all computers purchased after April 11, 2003; (2) a
 3 stipulation that defendants will not call certain guests as witnesses; and (3) copies of
 4 the closest to the original document for documents that correspond with KHAN 125,
 5 309-314. Hicks' Dec., ¶ 6, Exhibit E.

- 6 • On July 9, 2009 at 4:46 PM, plaintiff emailed defendant a meet and confer letter that
 7 request (1) additional information about defendants' destruction of metadata; (2)
 8 additional information about KHAN 123; and (3) more contact information for certain
 9 guests. Hicks' Dec., ¶ 7, Exhibit F. Plaintiff also requested defendants stipulate to
 10 not call any guests as witnesses at trial, if plaintiff was unable to contact these
 11 witnesses. *Id.*

12 On July 10, 2009, Roomy Khan told attorney Jonathan D. Hicks that she wished to
 13 terminate her attorney client relationship with Hoge Fenton, Inc. Hicks' Dec., ¶ 8. That
 14 same day, defendants' retained counsel, Damien Pamilla, faxed an executed proposed
 15 stipulation that confirms Mr. Pamilla is ready to serve as trial counsel for defendants.
 16 Hicks' Dec., ¶ 8, Exhibit G, pp. 1:28-2:8.² On July 20, 2009, defendant Roomy and
 17 Sakhawat Khan signed the attached declarations confirming their request to terminate
 18 Hoge Fenton, Inc. as their counsel. See Declaration of Roomy Khan Regarding
 19 Termination of Her Attorneys Of Record, Hoge Fenton Jones and Appel, Inc., (Roomy's
 20 Dec.), ¶ 1; and Declaration of Roomy Khan Regarding Termination of His Attorneys Of
 21 Record, Hoge Fenton Jones and Appel, Inc., (Sakhawat's Dec.), ¶ 1.

22 III. ARGUMENT

23 U.S. District Court of California, Northern District Court Local Civil Rules, Rule 11-5

25 ² Attorney Hicks drafted this declaration following the July 7, 2009 Case Management
 26 Conference. After the CMC, plaintiff's counsel, Carol Vigne, suggested pending discovery
 27 would not be resolved until defendants agreed to either consent to the deposition of certain
 28 guests or stipulate not to call these guests as witnesses during trial. This draft stipulation,
 therefore, reflects this anticipated discovery dispute. Notably, plaintiff makes this discovery
 request in her July 9th letter. Hicks' Dec. ¶ 7, Exhibit F, p. 2.

1 provides:

2 (a) **Order Permitting Withdrawal.** Counsel may not withdraw from
 3 an action until relieved by order of Court after written notice has
 4 been given reasonably in advance to the client and to all other
 5 parties who have appeared in the case.

6 The Local Rules also provide that withdrawal may be conditional if the application is not
 7 accompanied by an appearance of substitute counsel or agreement of the party to appear
 8 pro se. U.S. Dist. Crt., Civ. L. R., Rule 11-5 (b).

9 Here, the Court should unconditionally grant Hoge Fenton, Inc.'s motion to withdraw
 10 because (1) defendants terminated Hoge Fenton, Inc. as their attorneys and consent to
 11 representing themselves *in pro se*, until new counsel can substitute in; (2) Hoge Fenton,
 12 Inc. has good cause to withdraw because the attorney-client relationship has deteriorated
 13 to a point where Hoge Fenton, Inc. can no longer represent defendants; and (3)
 14 defendants breached their agreement with Hoge Fenton, Inc. regarding prompt payment of
 15 attorneys' fees and costs.

16 **A. A client has a right to terminate his counsel at any time.**

17 The California Supreme Court unequivocally held that clients have the absolute right
 18 to terminate their lawyer's services at any time, with or without cause. *Fracasse v. Brent*
 19 (1972) 6 Cal.3d 784, 790. Under California law, a client can terminate an attorney on the
 20 eve of trial. Cal. Code of Civ. Proc. § 284(1); and *Hock v. Superior Court* (1990) 221
 21 Cal.App.3d 670, 672-74.

22 Here, defendants clearly desire to terminate their relationship with Hoge Fenton, Inc.
 23 Roomy's Dec., ¶ 1 and Sakhawat's Dec., ¶ 1. Defendants also understand that, although
 24 they retained new counsel, defendants' immediate termination of Hoge Fenton, Inc. will
 25 result in their proceeding *in pro se* until their new counsel is admitted to practice in the
 26 Northern District Court. Roomy's Dec. ¶ 4 and Sakhawat's Dec. ¶ 4. Finally, defendants
 27 are aware that the trial date in this case is set for October 5, 2009, which will likely not
 28 change. Roomy's Dec. ¶ 2 and Sakhawat's Dec. ¶ 2.

Defendants' termination of Hoge Fenton, Inc. is sufficient to grant this motion to

1 withdraw. Accordingly, Hoge Fenton, Inc. respectfully requests this motion be granted so
 2 that defendants – fully aware of the potential implications of this decision – can exercise
 3 their right to terminate Hoge Fenton, Inc. If, however, the court does not believe
 4 defendants' termination of Hoge Fenton, Inc. is sufficient, then Hoge Fenton, Inc. requests
 5 in camera review – as requested below – to illustrate its good cause reasons for withdrawal
 6 pursuant to Rule 3-700 (c).

7 **B. An attorney may withdrawal based on the client's conduct.**

8 California Rules of Professional Conduct, provide that an attorney may withdraw
 9 from representing a client if the client's conduct "renders it unreasonably difficult for the
 10 member to carry out the employment effectively." Cal. R. of Prof. Conduct, Rule 3-
 11 700(C)(1)(d). In *Estate of Falco v. Decker* (1987) 188 Cal.App.3d 1004, the court held that
 12 courts should have broad discretion to grant a motion to withdraw based on a break down
 13 in communication, regardless of who caused the breakdown. *Estate of Falco v. Decker*,
 14 *supra*, 188 Cal.App.3d at 1014. Moreover, a client's failure to "cooperate" further supports
 15 an attorney's motion to withdraw as counsel. *People v. Prince* (1968) 268 Cal.App.2d 398,
 16 404-405.

17 However, attorneys are bound to preserve client confidences even when seeking to
 18 be relieved as counsel. See Cal. R. of Court, Rule 3.1362 (c). During withdrawal, counsel
 19 must take "reasonable steps to avoid reasonably foreseeable prejudice to the rights of the
 20 client." Cal. R. of Prof. Conduct, Rule 3-700 (A)(2). Hoge Fenton, Inc. must also protect
 21 any and all confidential communications it had with its clients. Evid. Code § 952 and 2,022
 22 *Ranch, L.L.C. v. Superior Court* (Chicago Title Ins. Co.) (2003) 113 Cal.App.4th 1377,
 23 1388.

24 Accordingly – to protect defendants' confidences – if the Court deems it necessary
 25 for Hoge Fenton, Inc. to provide additional information about its reasons for permissive
 26 withdrawal (pursuant to Rule 3-700 (C)), Hoge Fenton, Inc. respectfully requests the Court
 27 request in camera review of the facts that support Hoge Fenton, Inc.'s withdraw and allow
 28 Hoge Fenton, Inc. to file certain documents under seal, pursuant to Local Rule 79-5, for

1 review during the in camera hearing.

2 **C. An attorney may withdraw if the client breaches an agreement.**

3 California Rules of Professional Conduct, provide that an attorney may withdraw if
 4 the client "breaches an agreement or obligation to the member as to expenses or fees."
 5 Cal. Rule of Prof. Conduct, Rule 3-700(C)(1)(e).

6 Here, defendants currently owe Hoge Fenton, Inc. a substantial amount in unpaid
 7 legal fees. Additionally, defendants have refused to pay – despite numerous requests –
 8 certain expenses Hoge Fenton, Inc. incurred on their behalf. Concurrently, defendants
 9 seek to cap their fee obligations to Hoge Fenton, Inc. by terminating the attorney-client
 10 relationship.

11 As such, Hoge Fenton, Inc. believes this reason alone is sufficient to grant its
 12 motion to withdraw.

13 **D. Plaintiff will not be prejudiced by Hoge Fenton, Inc.'s withdrawal.**

14 Plaintiff's primary concern with Hoge Fenton, Inc.'s original request to withdraw was
 15 a singular focus in resolving all pending discovery disputes. Docket No. 104, p. 1:26-2:2.
 16 As discussed in detail above, plaintiff and defendant have narrowed the scope of disputed
 17 discovery issues to a few issues likely resolved through declaration and/or stipulation of the
 18 parties. It is also evident that, regardless of the defendants' response, plaintiff will likely
 19 demand further discovery responses from defendants. However, for defendant to answer
 20 plaintiff's pending discovery demands –including which witnesses to call during trial –
 21 defendants must seek advice and the professional counsel of their trial counsel, Mr.
 22 Damien Pamilla.

23 As such, Hoge Fenton, Inc.'s continued involvement in providing responses to
 24 plaintiff's continued discovery demands further slows the discovery process. Presently,
 25 before defendants produce any responses, Hoge Fenton, Inc. must confer with defendants
 26 and Mr. Pamilla, wait for approval from defendants as they continue to confer with Mr.
 27 Pamilla, then Hoge Fenton, Inc. reiterate the response approved by defendants in
 28 consultation with Mr. Pamilla. Under this scheme, Hoge Fenton, Inc. is merely an

1 intermediary unnecessarily slowing plaintiff's demanded discovery responses.

2 If plaintiff is truly interested in obtaining discovery responses and not interested in
3 unnecessarily burdening defendants, then plaintiff will support Hoge Fenton, Inc.'s motion
4 to withdraw – and anticipate an uninterrupted dialogue with defendants to provide
5 responses to plaintiff's pending discovery demands.

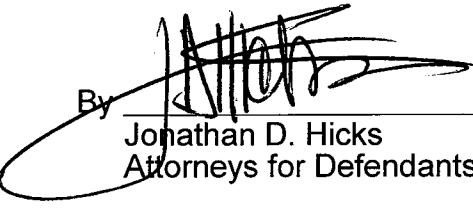
6 Therefore, plaintiff would suffer little to no prejudice if Hoge Fenton, Inc.'s motion is
7 granted.

8 **IV. CONCLUSION**

9 For the above stated reasons, Hoge Fenton, Inc. respectfully requests this Court
10 grant its motion to withdraw as attorney of record for defendants Roomy Khan and
11 Sakhawat Khan.

12 DATED: July 20, 2009

13 HOGE, FENTON, JONES & APPEL, INC.

14 By 

15 Jonathan D. Hicks
16 Attorneys for Defendants

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